

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,		C060541
Plaintiff and Respondent,		(Super. Ct. No. 08F04157)
v.		
RICHARD MIKE,		
Defendant and Appellant.		

A jury found defendant Richard Mike guilty of attempted robbery and misdemeanor false imprisonment (as a lesser included offense of the charged felony violation). The court granted probation for the attempted robbery conviction with a one-year jail term as a condition; it denied probation for the misdemeanor and sentenced him to a concurrent six-month jail term.

On appeal, defendant contends the trial court erred in admitting the extrajudicial statement of an unknown individual, and the evidence is insufficient to establish the element of confinement for false imprisonment. We shall affirm.

FACTS

The victim works the swing shift in downtown Sacramento until midnight. After work, he takes light rail to the station at Watt Avenue and Interstate 80 and then bicycles to his home in the north area. Robbed of his bicycle about a mile from his home in the early 1990's, he now carries pepper spray. He has not had any occasion before May 2008 to use it, even with daily encounters with panhandlers.

On May 15, 2008, he left work and rode the light rail train to the Watt Avenue terminus. This was the last train of the night. At this station, the trains are on the ground level beneath the Watt Avenue overpass. Disembarking passengers can reach Watt Avenue by stairs or elevators on either side of the overpass. Interstate 80 otherwise surrounds the station, although one can connect with Roseville Road after following the parking lot for two miles toward the station for that stop.

By the time the victim had donned his bicycle equipment, the other passengers had all departed. Following his custom, he headed for the elevator to the northbound side of Watt Avenue. He encountered defendant, who calmly asked if he could have some change or use the victim's cell phone to call for a ride. Defendant walked alongside the victim toward the elevator, repeating his request. When the elevator door opened, defendant stepped in front of the victim and blocked his way. He told him not to get onto this elevator or try to use the one for the southbound side of the street because he had a friend waiting

at the top with a gun. The doors closed with defendant inside the elevator, which ascended.

The victim was aware of the alternative egress through the parking lot. He was afraid to leave the station because defendant was in this elevator and there was possibly an armed accomplice at the other. He looked around for the security guard who was usually present but did not see him. He returned to the elevator. Defendant emerged, and more aggressively asserted that he knew the victim had a cell phone, and he knew he had money because he heard it rattling in his pocket. He did not repeat his need to summon a ride. Defendant pulled off his sweatshirt and slammed it on the ground, cursing. As he approached the victim, the latter feared defendant was going to punch him, so he pepper-sprayed him. The victim screamed loudly that he would kill defendant.

The security guard came running at last from the southern end of the station. Defendant ran off in the other direction. The victim told the guard what had happened; at trial, the victim did not recall whether he had told the guard about the presence of a possible accomplice.

When defendant disappeared, the guard thought he had gone back up in the elevator. The guard testified that the victim had in fact told him about the possible armed accomplice. He went up the southbound side stairs and encountered an individual who "asked me where his friend was, and uh, if the cops were coming." The guard told him that he did not know. The guard was not concerned with whether this individual was defendant's

accomplice because he was focused on trying to find defendant and the individual was not being hostile. Although he did not have any other factual basis, based on what the victim had told him, the guard believed this person was part of a plan to sequester the victim on the platform. After about 20 seconds, the guard heard the victim shouting downstairs. The guard had not been able to locate defendant; when he looked toward the sound, he saw defendant come from around the corner and ascend the stairs as the guard was coming down them. He lunged at the guard, who pepper-sprayed and handcuffed him (thereafter applying the deactivator for the spray).

The deputy who responded to the scene took a brief 15-minute statement from the victim because the situation had already been contained. He simply asked the victim what had happened without any follow-up questions. The deputy did not recall (and did not include in his report) any statement from the victim about defendant claiming that there was an accomplice prepared to shoot the victim *if he used the other elevator*; instead, the deputy had written that the victim had said defendant made a threat, while advancing on the victim after coming back to platform level, about an armed accomplice ready to shoot the victim.¹ The victim testified that the deputy was mistaken about the timing.

¹ To quote the deputy's testimony, "[Defendant] still requested the items [after throwing off his sweatshirt], um, and also referred to a friend, uh, he was with on the upper portion of the elevator that would shoot [the victim]."

DISCUSSION

I

Defendant invokes a principle from the tort of false imprisonment that there is no liability where a defendant has obstructed fewer than all means of egress, even if the remaining alternatives are not as convenient. (Rest.2d Torts, § 36(3); *id.*, com. (a) & ill. (1), p. 55 [no false imprisonment in room with locked door where open window four feet from ground, if person in good physical condition]; *People v. Martinez* (1984) 150 Cal.App.3d 579, 600, fn. 17 [principles for tort and crime of false imprisonment are identical].) He relies on this to argue that there is insufficient evidence to support the element of confinement, because there was an available egress from the Watt Avenue station through the parking lot² to Roseville Road with which the victim was familiar and which he could reach easily on his bicycle.

This ignores the evidence that the victim was afraid to use the other elevator because he believed defendant's claim of an armed accomplice on the southbound side of the overpass ready to shoot the victim if he used the elevator. With the unobstructed view from this vantage point of the parking lot to the south of the overpass, a jury could reasonably have made the implied

² The People, mischaracterizing the record, claim this would have required the victim to travel on the train tracks. This does not correctly reflect the testimony regarding the configuration of the station's connection with the Roseville Road station through the parking lot.

finding that the victim feared this partner in crime would have shot at him if he cycled away. This is sufficient to establish that the victim was confined to the platform.

II

Defendant sought to exclude the extrajudicial statement of the unknown person on the overpass. The trial court admitted the statement on a theory that it showed "the subsequent action and reaction of the security officer because now he believes that not only has an attempted robbery occurred, but there's a second person involved."

Defendant contends the statement contained an assertion that this individual was acting in concert with him (on which the prosecutor relied in closing argument). He argues the court's rationale for admission was not relevant to any issue. Consequently, he believes the statement does not have any indicia of reliability and does not come within any firmly rooted hearsay exception. He claims this resulted in a prejudicial violation of his confrontation rights, because this undermined defense counsel's theory of the case (defendant not having testified) in which the victim overreacted to a panhandling request that had never taken the necessary step toward an attempted robbery.

We do not need to resolve whether the court's evidentiary ruling was erroneous. Even without the extrajudicial statement of the unknown individual, the fact this person was lingering on the overpass at that time of night was of itself sufficient for the prosecutor to argue (and the jury to draw) the reasonable

inference of the person's connection with defendant, given the threat that such a person would be there.³ Furthermore, the statement (or the actual presence of the person) was irrelevant to the jury's evaluation of defendant's own conduct--including the *threat* of the existence of this person--in determining whether defendant had attempted to rob the victim or falsely imprisoned him on the platform. That there may have been a preexisting plan to confine a victim to the platform is simply surplusage in light of this evidence. We are thus convinced beyond a reasonable doubt that the outcome of the trial would have been the same in the absence of this testimony.

III

We note an error that requires correction. The reporter's transcript for the September 26, 2008, hearing on judgment and sentence, reflects that the trial court granted defendant probation for the attempted robbery conviction with the requirement that he serve one year in the county jail. However, the reporter's transcript reflects that, in addition, the trial court imposed a six-month concurrent term in jail for

³ Contrary to defendant's view, the extrajudicial statement was not essential to resolving the question of whether defendant in fact had told the victim of the person's presence before leaving in the elevator. As we noted above, the security guard testified that the victim had cautioned him about the possible presence of an accomplice; the deputy's account at least had the victim alluding to a similar reference (even if it differed with respect to timing and details from the victim's own account); and the victim's conduct at the time is in conformity with the threat to which he testified.

defendant's misdemeanor false imprisonment conviction. The minute order and order of probation do not include the six-month concurrent term imposed by the trial court. We will direct the trial court to correct this clerical error to accurately reflect the court's oral pronouncement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the minute order and order of probation filed September 26, 2008, to include defendant's concurrent six-month jail term for the misdemeanor false imprisonment conviction and to forward the appropriate documents to defendant and to the probation department.

_____, SIMS, Acting P. J.

We concur:

_____, HULL, J.

_____, BUTZ, J.